IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 16, 2004

STATE OF TENNESSEE v. MICHAEL L. WALLACE

Appeal from the Criminal Court for Campbell County
No. 11012 E. Shayne Sexton, Judge

No. E2003-01719-CCA-R3-CD - Filed November 23, 2004

Michael L. Wallace appeals from his Campbell County Criminal Court convictions of four counts of rape of a child and one count of aggravated sexual battery. He claims that his convictions are not supported by sufficient evidence, that the lower court erred in failing to grant a motion for judgment of acquittal on three of the five counts, and that he should not have received a 90-year sentence. Because three of the defendant's five convictions are based upon uncorroborated inculpatory statements, we reverse those convictions and dismiss those charges. In all other respects, we affirm.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed in Part; Reversed in Part.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which GARY R. WADE, P.J. and JOSEPH M. TIPTON, J., joined.

Martha J. Yoakum, District Public Defender; and Charles A. Herman, Assistant District Public Defender, for the Appellant, Michael L. Wallace.

Paul G. Summers, Attorney General & Reporter; David H. Findley, Assistant Attorney General; William Paul Phillips, District Attorney General; and Scarlett W. Ellis, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In the light most favorable to the state, the evidence at the defendant's trial demonstrated that on July 22, 2001, Larry Jeffers was hiking in Cove Lake Park where he came upon a parked car. Inside he saw the defendant and the ten-year-old victim. The defendant was kneeling in front of the victim and holding a pair of panties. The defendant was clothed, but the victim was naked save her shoes and socks. Jeffers called 911 on his cellular phone and reported the matter to the authorities.

Before police officers arrived, the defendant attempted to engage in small talk and told Jeffers that he was teaching the victim to swim, although Jeffers observed that the water nearby was too shallow for swimming, measuring no more than six inches deep. At one point, the victim got out of the car and began crying, and Jeffers attempted to comfort her.

Various law enforcement officers testified about their involvement in the case. Generally, their testimony established that the defendant's pants were unzipped at the scene, and he claimed that he had forgotten to zip them after relieving himself. The defendant told officers who responded to the scene that he brought the victim to the location to go swimming. He said that the victim had removed her clothing other than her panties, gone to the water and tested it with her foot, then refused to swim because she thought the water was too deep. The victim's account at the scene was basically consistent with that of the defendant. She claimed that she had removed her own clothing and that they were going swimming. The victim also asked whether the defendant would be taken to jail and reported that the defendant told her not to say anything or he would be taken to jail and she might be, as well.

The defendant was questioned later at the police department and admitted he had sexually penetrated the victim at Cove Lake Park. He admitted that the penetration was both digital and penile. Additionally, he confessed that he had forced the victim to fellate him on two occasions, the more recent being July 22. He said that both times this occurred at the location in Cove Lake Park where he had been apprehended. He also admitted to digitally penetrating the victim on July 18 and to performing cunnilingus on her on two occasions. Further, he admitted that he had fondled, but not penetrated, the victim on an earlier occasion in June 2001.

The victim's mother testified that she had been in a romantic relationship with the defendant. Although initially hesitant to allow the victim to spend time around him, once the mother got to know him she allowed the victim to spend time with the defendant, first with herself and the victim's brothers. Eventually, the victim's mother allowed the victim to attend the defendant's church services with him. The victim's mother testified that the relationship between the defendant and the victim appeared to mimic a father/daughter relationship and that she never observed anything inappropriate. After the July 22 incident at Cove Lake Park, the victim never told her mother what had happened until the night before trial.

The victim's mother admitted that the defendant had written her a love letter while he was in jail, in which he asked her to help him get out of jail and promised that they would be together. The victim's mother wrote the defendant back, expressing her love for him and asking him to call her. They spoke by phone the Sunday night before trial, but they did not talk about the trial.

The victim testified that she and the defendant went alone together to church. She believed there was only one time that they did this. During this outing, the defendant touched her breast, private part, and mouth with his hand, his mouth, and his private part. The defendant removed her dress and underwear and removed his private part from his pants but did not remove his pants. She testified that he touched her breast and genitals with his mouth. She claimed that the

defendant "had sex with" her. The victim recounted that after Mr. Jeffers discovered them in the car, the defendant told her not to tell anyone what he had done and said that they both would go to jail. The victim conceded that she told a doctor at Children's Hospital and police officers that nothing happened.

To discredit the state's proof, the defendant offered his own testimony. The defendant's testimony was, in many respects, riddled with inconsistencies. He claimed that although he had made inculpatory statements to law enforcement officers on July 22, he was, in fact, innocent of any wrongdoing toward the victim. He claimed that he gave a false confession because he was intimidated by the armed law enforcement officers and was inexperienced in dealing with the authorities.

The defendant denied romantic involvement with the victim's mother. However, he first admitted writing a letter to the victim's mother in which he professed his love for her and wished her a happy Valentine's Day, but he then claimed ignorance of the romantic portions of the letter, claiming another inmate wrote part of the letter under the direction of a third inmate.

The defendant maintained that his association with the victim and her family grew out of his playing ball with the victim's brothers. He testified that he took the victim to church with him about four times. He claimed that on July 22 he was with the victim at Cove Lake Park after church because he wanted to see if the water was the proper depth for fishing. He testified alternately that the victim disrobed and went to the water to test it with her foot and that she remained in the car while he went to check the water. He admitted that his pants were unzipped when Mr. Jeffers and the authorities were at the park, but he explained that he had relieved himself before their arrival and his zipper was stuck. He claimed that he had been to the location in Cove Lake Park, where Mr. Jeffers discovered him, only on two occasions - - once in January with his girlfriend and the second time on July 22 with the victim.

The state's rebuttal proof contradicted several portions of the defendant's testimony. A police officer testified that the defendant told him at the scene that he took the victim to the park because she wanted to go swimming. He claimed he closed his eyes while she disrobed and the two of them went to the water together, but he told her the water was too deep. The defendant told the officer that the victim was his niece.

An employee of a towing service testified that he had participated in towing the defendant's car from the scene. He claimed that he had seen the same vehicle in the same location two and a half to three weeks earlier.

The defendant testified on surrebuttal that on July 21 he purchased the vehicle that he was driving on July 22 and was never in that vehicle at Cove Lake Park prior to July 22.

After receiving all the proof, the jury found the defendant guilty of rape of a child on July 18, 2001 (two counts), rape of a child on July 22, 2001 (two counts), and aggravated sexual

battery on an unspecified date in July 2001. At the sentencing hearing, the court imposed an effective 90-year sentence. This appeal followed.

I

The defendant challenges the sufficiency of the convicting evidence on each of his five convictions and challenges the trial court's denial of his motion for judgment of acquittal on three of the five counts.

A motion for judgment of acquittal is a question of the sufficiency of the state's evidence of the defendant's guilt of the crime charged. *State v. Hall*, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). Accordingly, the standard for determining whether a motion for judgment of acquittal should be granted is analogous to the standard employed in reviewing the sufficiency of the convicting evidence after a conviction has been imposed. *See State v. Jerry Burke*, No. 02C01-9510-CR-00319 (Tenn. Crim. App., Jackson, Dec. 11, 1996), *perm. app. denied* (Tenn. 1997); *State v. Adams*, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995).

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Duncan*, 698 S.W.2d 63, 67 (Tenn. 1985). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000).

In determining the sufficiency of the evidence, this court should not reweigh or reevaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from the evidence. *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956); *Farmer v. State*, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). On the contrary, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Cabbage*, 571 S.W.2d at 835.

Clearly, the evidence viewed in the light most favorable to the state demonstrates that the defendant sexually penetrated the victim on July 22, 2001. The victim testified, "[The defendant] had sex with me." Among other acts, she recounted that the defendant performed cunnilingus on her and had her fellate him and that he touched her private part with his private part. The defendant made inculpatory statements to law enforcement officers that day. He admitted to penile penetration and to having the victim perform fellatio on him on that date. Although the defendant recanted his

statements at trial, the jury had the prerogative as the trier of fact to reject his testimony in favor of his earlier statements and the victim's testimony.

Likewise, there is evidence via the defendant's pretrial statements that he touched the victim's vaginal area in June 2001 and that he penetrated her vaginally and had her fellate him on July 18, 2001. The defendant argues that his inculpatory statements regarding these incidents lack sufficient corroboration to sustain his convictions.

The rule in Tennessee is that there must be evidence independent of a defendant's confession to a crime to establish the *corpus delicti*, or body of the crime. *See State v. Smith*, 24 S.W.3d 274, 281 (Tenn. 2000). Although the corroborating evidence need not be sufficient, standing alone, to sustain the conviction, it must be enough to establish that a certain result has been produced and that the result was produced via some criminal agency. *See State v. Jones*, 15 S.W.3d 880, 890-91 (Tenn. Crim. App. 1999); *Taylor v. State*, 479 S.W.2d 659, 661-62 (Tenn. Crim. App. 1972) ("A confession may sustain a conviction where there is other evidence sufficient to show the commission of the crime by someone.").

In the case at bar, the *only* evidence that the defendant committed sexual assaults of the victim in June 2001 and on July 18, 2001, is found in the defendant's inculpatory statements to law enforcement. The victim testified at trial that the only time the defendant abused her was on July 22, 2001, and her prior statements did not contradict that testimony. Although the defendant's prior statements indicated that the July 18 assaults took place at Cove Lake Park and there was evidence that a witness saw the defendant's car at the park in the weeks prior to the July 22 incident, there was no evidence that a crime took place. Thus, we are constrained, in keeping with the law of this state, to hold that the June 2001 and July 18, 2001 aggravated sexual battery conviction and two rape of a child convictions cannot stand.

II

We thus move to the question of sentencing. The trial court imposed an effective 90-year sentence for the defendant's five convictions. The court ordered 25-year sentences for the two July 18, 2001 rape of a child convictions, 20-year sentences for the two July 22, 2001 rape of a child convictions, and 8 years for the aggravated sexual battery conviction. The court ordered each of the rape of a child sentences to run consecutively, with concurrent service of the aggravated sexual battery sentence. In the wake of our holding that three of the defendant's convictions are not supported by sufficient evidence, the defendant's effective sentence for the remaining two July 22 offense convictions is 40 years. We therefore consider whether the trial court erred in imposing an effective 40-year term for those two convictions.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is "conditioned upon the affirmative showing in the record that the trial court

considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). "The burden of showing that the sentence is improper is upon the appellant." *Id*. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely *de novo*. *Id.* If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b) (2003); 40-35-103(5) (2003); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

We are mindful of the United States Supreme Court's recent decision in *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004), in which the High Court said that other than when based on the fact of a prior conviction, a judicially imposed sentence cannot exceed the maximum sentence statutorily allowed "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" unless the facts relied upon for enhancement are found to exist beyond a reasonable doubt by a jury. *Id.* at __, 124 S. Ct. at 2537 (emphasis omitted) ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.") Although *Blakely* clearly applies to individual length-of-sentence determinations, the Tennessee appellate courts have not definitively resolved whether *Blakely* applies to consecutive sentencing.

In the present case, the sentences with which we are concerned are both for 20 years, which is the presumptive sentence under the statute absent a finding of enhancement and/or mitigating factors. *See* Tenn. Code Ann. § 40-35-210(c) (2003). Under *Blakely*, the sentence could not be enhanced by factors which were not found to exist beyond a reasonable doubt by the jury, other than prior criminal convictions. Inasmuch as the record does not reflect any prior convictions of the defendant, no enhancement beyond the presumptive sentence is appropriate.

The defendant claims that his sentences should have been mitigated by a finding that he had no prior criminal history. Although that factor may be considered, the weight to be afforded is within the discretion of the sentencing court. *See State v. Hicks*, 868 S.W.2d 729, 731 n.5 (Tenn. Crim. App. 1993). In the present case, we are unpersuaded that the defendant carried his burden of demonstrating that this factor should be applied given that the defendant was convicted of multiple offenses and admitted to additional offensive conduct.

Therefore, we hold, in the absence of both enhancement and mitigating factors, that the trial court did not err in imposing the presumptive 20-year sentence for the defendant's two rape of a child convictions.

We turn, therefore, to the question of consecutive sentencing. In the present case, the trial court imposed consecutive sentences based upon a finding that the defendant committed multiple sexual offenses against a minor victim, a statutory factor authorizing consecutive sentencing. *See* Tenn. Code Ann. § 40-35-115(b)(5) (2003).

As stated above, it has not previously been determined whether *Blakely*'s requirement of jury findings as a predicate to increased punishment applies to consecutive sentencing determinations, inasmuch as neither the Tennessee Supreme Court nor the United States Supreme Court has directly addressed that question. Posing the question, at least, is apt because our law provides that, in the absence of applicable statutory factors authorizing or requiring consecutive sentencing, multiple sentences *shall* be imposed to run concurrently. *See id.* § 40-35-115(d) (2003).

In support of *Blakely's* application to consecutive sentencing decisions, we note the *Blakely* Court did not speak in narrow terms that targeted merely the length of an accused's sentence; rather, it spoke in broad terms of the state's power to punish: "When a judge inflicts *punishment* that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the *punishment*,'. . . and the judge exceeds his proper authority." *Blakely*, 542 U.S. at __, 124 S. Ct. at 2537 (quoting 1 J. Bishop, Criminal Procedure, § 87, at 55 (2d ed. 1872)) (emphasis added). Accordingly, it may be logically argued that a consecutive sentence is a greater punishment than a concurrent sentence. If so, *Blakely* may require a jury's finding of facts, other than prior convictions, as a state law predicate for the imposition of consecutive sentencing.

Tennessee Code Annotated section 40-35-115(b) enumerates factual bases which authorize consecutive sentencing. In the present case, the consecutive sentencing factor upon which the trial court relied is as follows:

> The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of the defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims[.]

Tenn. Code Ann. § 40-35-115(b)(5) (2003). As noted above, in the absence of this or some other authorizing factor, state law requires the use of concurrent sentencing. *Id.* § 40-35-115(d) (2003). Clearly, reliance on this factor requires the sentencing court to make factual findings of aggravating circumstances. If *Blakely* applies, such findings would fall within the domain of the jury, not the court.

However, after ordering supplemental briefing by the parties and considering their submissions, we are not convinced that *Blakely* should be read so broadly.

Blakely was based upon the principles of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). Both cases involved sentences for a single offense, and no issue regarding consecutive sentencing was presented in either case. We believe, however, *Apprendi* establishes that the right to jury trial as embodied in the Sixth Amendment applies merely to the findings necessary to establish a defendant's guilt of a specific offense. For instance, the High Court adopted for purposes of state application the language of *Jones v. United States*, 526 U.S. 227, 243 n.6, 119 S. Ct. 1215, 1224 n.6 (1999), a federal prosecution: "[U]nder the Due Process Clause of the Fifth Amendment and the . . . jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum *penalty for a crime* must be . . . submitted to a jury . . . ." *Apprendi*, 530 U.S. at 476, 120 S. Ct. at 2355 (emphasis added). Additionally, the Court said, "Taken together, [the due process and jury trial rights] indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty *of every element of the crime with which he is charged*, beyond a reasonable doubt.'" *Id.* at 477, 120 S. Ct. at 2355-56 (emphasis added); *see People v. Sykes*, 120 Cal. App. 4th 1331, 16 Cal. Rptr. 3d 317, 327 (Cal. App. 2 Dist. 2004). We believe these references to the findings necessary to establish the required *elements* for individual *offenses*, including findings that support extraordinary sentences, articulate that the due process and jury trial guarantees have no application to a judge's consecutive sentencing determination. As such, we believe these references reflect a time-honored view that, once convictions and the lengths of individual sentences are determined, the judge is the arbiter of whether the sentences shall run concurrently or consecutively.

Accordingly, we hold that the *Apprendi-Blakely* rule does not apply to the trial court's imposition of consecutive sentences.

In the present case, as a matter of state law, Code section 40-35-115(b)(5), establishing multiple offenses involving sexual abuse of a minor as a basis for consecutive sentencing, justifies consecutive service of the defendant's two 20-year sentences. To be sure, the trial court is to consider the relationship between the defendant and the victim, the time span of the offenses, the nature and scope of the sexual acts, and the extent of the "residual, physical and mental damage to the victim." *See* Tenn. Code Ann. § 40-35-115(b)(5) (2003). Just as surely, the trial court considered these factors. Based upon the defendant's pretrial statements, the trial court found that the defendant's abuse of the victim spanned from June into July 2001. The court remarked that the defendant's abuse of the victim apparently ceased only because, by happenstance, a passerby discovered an offense in progress and alerted the police. The trial court essentially found that the nature and scope of the sexual acts were varied and substantial. The victim's mother testified that the defendant had assumed a fatherly role in the victim's life, and her victim impact statement indicated that, following the offenses, the victim felt insecure around men, would not speak on the telephone with a male, had received counseling, and was in need of further counseling. Based upon those statements, the trial court found that the victim had been profoundly affected by the crimes.

We believe these findings are supported in the record and, in turn, support the imposition of consecutive sentences.

In summary, we reverse the defendant's conviction of aggravated sexual battery occurring on an unspecified date in June 2001. We reverse the defendant's convictions of rape of a child occurring on July 18, 2001. Theses charges must be dismissed. We affirm the defendant's convictions of rape of a child occurring on July 22, 2001. We also affirm the defendant's 20-year sentences for his two rape of a child convictions and the order for consecutive sentencing.

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JAMES CURWOOD WITT, JR., JUDGE